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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. 593

GILBERT H. MILLER and G. H. Miller and Company,
Petitioners,

versus

UNITED STATES OF AMERICA and Ezra Taft Benson, Secretary of Agriculture of the United States,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958.

No.

GILBERT H. MILLER and G. H. Miller and Company,
Petitioners.

versus

UNITED STATES OF AMERICA and Ezra Taft Benson,
Secretary of Agriculture of the United States,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petitioners respectfully show:

JURISDICTION.

The order of the Secretary of Agriculture revoking the registration of G. H. Miller and Company as a futures commission merchant and the registration of Gilbert H.

Miller as a floor broker and suspending both from all trading privileges was entered on September 25, 1956. (App. 1358-1402). A petition for review pursuant to § 6(b) of the Commodity Exchange Act, 7 U. S. C. § 9, was taken to the Court of Appeals for the Seventh Circuit on January 27, 1957 (App. Vol. V, pp. 1-10). The Court of Appeals for the Seventh Circuit entered a judgment affirming the order of the Secretary of Agriculture on January 7, 1958. (Appendix A to this brief) On rehearing, the Court of Appeals amended its judgment and modified the order of the Secretary of Agriculture insofar as the penalties imposed were concerned. (Appendix B to this brief) On a second rehearing, *en banc*, the Court of Appeals reinstated its original judgment on September 23, 1958. (Appendix C to this brief)

The jurisdiction of this Court is invoked pursuant to 28 U. S. C. §§ 1254(1) and 2104(c).

OPINIONS BELOW.

The opinions of the Court of Appeals for the Seventh Circuit are not yet reported. They are set forth in Appendices A, B, and C of this brief. The report of the Referee of the Department of Agriculture is to be found in the Appendix which accompanies this brief at pp. 1275-1299. The Decision and Order of the Judicial Officer of the Department of Agriculture are set out in the Appendix at pp. 1358-1402.

STATUTES INVOLVED.

Commodity Exchange Act, § 6(b), 7 U. S. C. § 9:

> "If the Secretary of Agriculture has reason to believe that any person (other than a contract market) is violating or has violated any of the provisions of this chapter, or any of the rules and regulations made pursuant to its requirements, or has manipu

lated or is attempting to manipulate the market price of any commodity, in interstate commerce, or for future delivery on or subject to the rules of any board of trade, he may serve upon such person a complaint stating his charges in that respect, to which complaint shall be attached or contained therein a notice of hearing, specifying a day and place not less than three days after the service thereof, requiring such person to show cause why an order should not be made directing that all contract markets until further notice of the Secretary of Agriculture refuse all trading privileges to such person, and to show cause why the registration of such person, if registered as futures commission merchant or as floor broker hereunder, should not be suspended or revoked. Said hearing may be held in Washington, District of Columbia, or elsewhere, before the Secretary of Agriculture, or before a referee designated by the Secretary of Agriculture, which referee shall cause all evidence to be reduced to writing and forthwith transmit the same to the Secretary of Agriculture. Upon evidence received, the Secretary of Agriculture may require all contract markets to refuse such person all trading privileges thereon for such period as may be specified in the order, and, if such person is registered as futures commission merchant or as floor broker hereunder, may suspend, for a period not to exceed six months, or revoke, the registration of such person. Notice of such order shall be sent forthwith by registered mail or delivered to the offending person and to the governing boards of said contract markets.

"After the issuance of the order by the Secretary of Agriculture, as aforesaid, the person against whom it is issued may obtain a review of such order or such other equitable relief as to the court may seem just by filing in the United States court of appeals of the circuit in which the petitioner is doing business a written petition praying that the order of the Secretary of Agriculture be set aside. A copy of such

petition shall be forthwith served upon the Secretary of Agriculture by delivering such copy to him, and thereupon the Secretary of Agriculture shall forthwith certify and file in the court a transcript of the record theretofore made, including evidence received. Upon the filing of the transcript the court shall have jurisdiction to affirm, to set aside, or modify the order of the Secretary of Agriculture, and the findings of the Secretary of Agriculture as to the facts, if supported by the weight of evidence, shall in like manner be conclusive."

28 U. S. C. § 46(c):

"Cases and controversies shall be heard and determined by a court or division of not more than three judges, unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in active service. A court in banc shall consist of all active circuit judges of the circuit."

STATEMENT.

This litigation was begun on September 1, 1953 by the issuance of a complaint by the Assistant Secretary of Agriculture charging that the petitioners and 13 others had acted collectively and in a uniform manner pursuant to agreement and had cornered and manipulated the December, 1952 egg market on the Chicago Mercantile Exchange (App. 19). The accused were the petitioners, G. H. Miller and Company, a registered futures commission merchant, Gilbert H. Miller, a registered floor broker, and thirteen other individuals and companies dealing in cash eggs and egg futures (App. 16-18, 1363-64). The complaint charged that the accused had concentrated their purchasing of egg futures contracts in the period between December 17-19, thereafter required and accepted deliveries of large quantities of cash eggs

on futures contracts which they had purchased, and withheld from sale or refused to deliver eggs on the market, thus preventing those who had sold the market short from acquiring eggs to meet their obligations, except from the accused on terms which the latter could dictate (App. 20-3).

The only evidence adduced before the Hearing Examiner was that offered by the respondents. This evidence revealed facts which are not in controversy. Despite these facts, the Judicial Officer—who had not heard the evidence—entered certain findings of fact in contradiction of the evidence. It is on these findings that the penalties on petitioners were imposed and on which the respondents' case is predicated.

1. On the first element in respondents' case, the Judicial Officer found that all of the accused had engaged in the "aggressive and concentrated purchases of December futures" contracts during December 17-19, 1952 (Finding 52, App. 1385). The undisputed facts are that petitioners did not purchase any December futures contracts during the period in question. On December 17, Miller *sold* two cars of *cash* eggs and lifted two of his *short futures hedges*. (Exh. 53, App. 2121). On December 18, Miller *bought and sold* two December futures contracts. (Exhs. 1, 53, App. 2043, 2121) On December 19, Miller *sold* fourteen December futures contracts. (Exhs. 1, 53, App. 2043, 2121)

2. On the second element in respondents' case, the Judicial Officer found that: *a*) In December, "Miller and Company received, *on behalf of itself* and other respondents, 70 carlots out of a total of 76 carlots of eggs delivered to *final receivers*...." (Finding 43, App. 1380-81). *b*) "After December 23, respondent Miller and Company received 45 additional carlots of refrigerator eggs in Decem-

ber in satisfaction of December futures *held by itself* and other respondents;" (Finding 44, App. 1381) The undisputed facts are that petitioners did not receive a single carlot of eggs as a final receiver at any time during December, 1952. Rather than standing for final delivery of even one car of eggs, petitioners delivered nine cars in December against a short position which he had taken on December 22. (Exh. 1, App. 2043)

3. On the third element in the case against petitioners, the Judicial Officer found that the accused had withheld futures and cash eggs from sale in December. (Finding 52, App. 1385) The undisputed facts are that on November 30, Miller had 36 cars of cash storage eggs in his possession. He sold 32 cars prior to December 17, three cars on December 18, and delivered one car against a short futures position. (App. 768, 1132.) He received eight cars on delivery during the month which he delivered during the month. (Exh. 1, App. 2043) In addition, Miller merchandised 100 cars of cash fresh eggs during December. (App. 717-9)

Despite these undisputed facts penal sanctions were imposed on petitioners as having engaged in the activities charged in the complaint. Not only were the penalties imposed, but the penalties were more stringent with regard to petitioners than with regard to the other accused whose trading activties tended to conform with the allegations of the complaint. All of the others received a penalty of suspension from trading for various periods ranging from 60 days to one year. (App 1401) Petitioners had their registrations revoked and were suspended from trading for a period of one year, a penalty which constitutes a complete ban on Miller's continuing to engage in the business by which he earns his living. These penalties were not only more severe than those imposed on

the other accused but were more severe than any penalties imposed in the entire history of the Commodity Exchange Authority and its predecessor the Grain Futures Administration.

On review by the Court of Appeals for the Seventh Circuit, the Court affirmed the action of the Secretary of Agriculture in its entirety, resting primarily on the proposition that the failure of the accused to testify supplied evidence of the facts charged in the complaint and found by the Judicial Officer. When, on petition for rehearing, the petitioners asserted that even if they had been guilty of the acts charged, the penalties imposed were unreasonable and unduly harsh—a position not challenged on that rehearing by the respondents—Judges Major and Schnackenberg, over the dissent of Judge Parkinson, reduced the penalties imposed by respondents which, though suspending their registrations for six months and banning them from carrying on speculation for a period of one year allowed them to utilize the market for legitimate hedges in carrying on their cash egg merchandising activities.

The respondents then sought a petition for rehearing *en banc*, limited to the question of the power of the Court of Appeals to modify the penal sanctions which had been imposed. On May 16, 1958, the Court of Appeals for the Seventh Circuit entered an order granting a second rehearing *en banc* limited to the question:

> "Does the Court of Appeals have the power and jurisdiction to change a penalty fixed by respondent Secretary of Agriculture, which penalty is within the statutory limits"? (Appendix D to this brief)

At the same time, they disqualified Judge Major from participating in this rehearing. On September 23, 1958, the Court of Appeals answered their own question in the negative. As Judge Schnackenberg said in his dissent,

the majority "opinion reveals no disagreement among members of the court as to the harshness of the penalty imposed by the administrative agency,—but disagreement only as to the court's *power* to restrain the agency when it seeks to inflict an unreasonable and harsh penalty." (Emphasis in original)

QUESTIONS PRESENTED.

1. May a Court of Appeals and an administrative agency rely on the failure of the accused to testify as evidence of the truth of the charges made against them?

2. Does a Court of Appeals have the power to modify "an unreasonable and harsh" penalty imposed by an administrative agency where the statute provides that "the court shall have jurisdiction to affirm, to set aside, or modify the order . . ."?

3. Is a retired judge of the Court of Appeals who has been designated and assigned to judicial duties on that Circuit disqualified from participating in a rehearing *en banc* of a case in which he was one of a two-judge majority on the original panel?

REASONS FOR GRANTING THE WRIT.

1. The Court of Appeals ruling that the silence of the accused may be used to supply gaps in the evidence of the prosecution is contrary to the principles established by this Court.

2. In deciding that a Court of Appeals is without power to modify a penalty imposed by an administrative agency, although the statute specifically authorizes the Court of Appeals to modify the administrative agency's order, the Court of Appeals for the Seventh Circuit decided a question of great public importance contrary

to the decisions of this Court and to the command of Congress.

3. In deciding that a retired circuit judge who has been designated and assigned to perform judicial duties of the same nature as his colleagues is not eligible to sit on a rehearing *en banc*, the Court of Appeals for the Seventh Circuit erroneously decided a question of great importance to the administration of justice in the federal courts which has not been passed on by this Court.

ARGUMENT.

I.

THE COURT OF APPEALS ERRONEOUSLY RELIED ON THE FAILURE OF THE ACCUSED TO TESTIFY AS CREATING "A PRESUMPTION THAT THEIR TESTIMONY WOULD HAVE BEEN UNFAVORABLE TO THEM."

By its terms, the Commodity Exchange Act, § 6(b), 7 U. S. C. § 9, assigns to the reviewing court the duty to examine the evidence in support of the Secretary of Agriculture's findings of fact to determine whether the findings are supported by the greater weight or preponderance of the evidence: *General Foods Corporation* v. *Brannan*, 170 F. 2d 220 (C.A. 7, 1948). Although the Court below purported to apply this standard it came to a conclusion which could not be sustained even if the scintilla rule had been controlling. For in weighing the evidence, the Court of Appeals repeatedly relied on the fact that the accused failed to testify as weighting the scales against them.

As we have shown in the statement, the respondents' case against the petitioners had to rest on proof of three categories of acts: proof that petitioners engaged in the "aggressive and concentrated purchases of December futures" during December 17-19; proof that the petitioners required and took final delivery of eggs during the month of December; and proof that petitioners withheld eggs from the market during December. The only evidence in the record shows that petitioners did not buy, but sold, egg futures during the period December 17-19; that the petitioners received no eggs for final delivery in December but made deliveries; and that petitioners did not

withhold but actively sold and delivered all the eggs in their possession during December. See Statement, *supra* at pp. 5-6. Neither the opinions of the Court of Appeals nor the briefs of the respondents have ever shown the existence of any evidence of record to contradict these facts. Respondents have at no time disputed their accuracy. Despite this, the Court of Appeals ruled that the failure of the petitioners to introduce testimony was to be treated as a presumption that what they would have said had they testified would have provided the evidence against them which the prosecution failed to produce.

Certainly, where evidence is introduced to demonstrate the existence of a fact, and any evidence to the contrary, if it existed, would be under the control of the accused, the failure of the accused to produce that evidence may be read as proof that the evidence would have been favorable to the prosecution's case. See *Interstate Circuit* v. *United States*, 306 U. S. 208, 225-28 (1939). Though even this proposition must be treated warily. See *Bridges* v. *Wixon*, 326 U. S. 135 (1945). But where, as here, there is nothing in the record to support the accusation of the prosecutor except his own allegations in his complaint, no burden can be placed on the accused to rebut it. This Court has stated the appropriate principle in *Mammoth Oil Co.* v. *United States*, 275 U. S. 13, 52 (1927):

> "While Sinclair's failure to testify cannot properly be held to supply any fact not reasonably supported by the substantive evidence in the case [citations omitted], it justly may be inferred that he was not in any position to combat or explain away any fact or circumstance so supported by the evidence and material to the government's case [citations omitted]."

We respectfully submit that in the instant case the Court of Appeals held that the petitioners' failure to

testify could properly be held to supply facts not supported by the substantive evidence—indeed, to supply facts contradictory of the only evidence on the issue.

Highly significant on this issue is the fact that respondents presented as direct evidence, complete interviews with all of the accused, taken by competent investigators either during or shortly after the December futures trading. The principal investigator testified that all information which he sought from the accused was readily, freely and fully available and in his opinion, "their statements were substantially as they felt were correct and truthful." (App. 456, 459) The interviews were conducted for the purpose of establishing possible participation in a manipulative conspiracy and the reasons why the individuals involved traded in the egg market. (App. 450) Respondents' interviewer-witnesses testified under oath; their testimony was presented as factually correct evidence. We accepted and relied upon the factual statements presented by these respondents' witnesses. In effect, the testimony of petitioners and the other accused was presented of record through the medium of reported interviews given at the time, or shortly after, the events had occurred. Respondents have rejected these interviews which they presented as evidence, since the interviews contradict the charges made.

Under such circumstances the presumption of guilt raised by the Court of Appeals for failure of the petitioners to testify is doubly unwarranted, since the essence of such testimony was already contained in the record, as presented directly by respondents. (Exhs. 20-8, 53, App. 2076-87, 2120-1)

II.

THE QUESTION OF THE JUDICIAL POWER TO MODIFY AN ADMINISTRATIVE ORDER IS ONE OF GREAT PUBLIC IMPORTANCE AND HAS BEEN DECIDED BY THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT IN A WAY CONTRARY TO THE DECISIONS OF THIS COURT.

Assuming *arguendo* that there had been evidence in support of the Secretary of Agriculture's findings on which the Court of Appeals could rest, the question would remain whether the Court of Appeals has been authorized by Congress to modify a penalty imposed by the Secretary of Agriculture which the court found to be "unduly harsh." The sole question here is the power of the Court of Appeals, for to repeat Judge Schnackenberg's statement below: the majority "opinion reveals no disagreement among members of the court as to the harshness of the penalty imposed by the administrative agency,—but disagreement only as to the court's *power* to restrain the agency when it seeks to inflict an unreasonable and harsh penalty." (Emphasis in the original.) This was the only question upon which the rehearing *en banc* was granted. The unreasonableness and harshness of the penalty is underlined by the fact that it was far greater than any imposed on the others found guilty of the same violation and indeed more stringent than any penalty ever imposed by the Commodity Exchange Authority or its predecessor Grain Futures Administration.

The radiations of the Court of Appeals' decision that Congress did not mean "modify" when it said "modify" in the Commodity Exchange Act go far beyond the administration of that statute. The same or similar language is used in most of the statutes providing for judicial review of administrative determinations and would be subject to the same construction. The follow-

ing are but a few examples: the Federal Trade Commission Act, § 5, 15 U.S.C. § 45c; the Securities Exchange Act, § 25, 15 U.S.C. § 78y; the Federal Power Act, §313 (b), 16 U.S.C. §825 l (b); the National Labor Relations Act, § 10 (f), 29 U.S.C. § 160 (f).

Only last term, this Court reiterated its doctrine that the reviewing court does have power to modify orders of the administrative agency where the statute charges the court with exercising such power, as it does in the instant case. *N.L.R.B. v. District 50, United Mine Workers*, 355 U.S. 453 (1958). This decision was in accord with a long line of earlier precedents. See, *e.g.*, *N.L.R.B.* v. *Express Pub. Co.*, 312 U.S. 426 (1941); *F.T.C.* v. *Beech-Nut Packing Co.*, 257 U.S. 441 (1922). We do not here deny that the primary responsibility for fashioning appropriate administrative orders is vested in the administrative agency. We do contend that Congress required the reviewing court to exercise its power to modify the order of the agency where the order is improper under standards long recognized by this Court:

> ". . . The Board's discretionary authority to fashion remedies to purge unfair labor practices necessarily has a broad reach. *Labor Board* v. *Link-Belt Co.*, 311 U.S. 584, 600. But the power is not limitless; it is contained by the requirement that the remedy shall be 'appropriate,' *Labor Board* v. *Bradford Dyeing Assn.*, 310 U.S. 318, and shall 'be adapted to the situation which calls for redress,' *Labor Board* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333, 348. The Board may not apply 'a remedy it has worked out on the basis of its experience, without regard to circumstances which may make its application to a particular situation oppressive and therefore not calculated to effectuate a policy of the Act.' *Labor Board* v. *Seven-Up Bottling Co.*, 344 U.S. 344, 349. The Board's provision for a Board certification must therefore be

> examined in the light of its appropriateness in the circumstances of this case." *N.L.R.B.* v. *District 50, United Mine Workers*, 355 U.S. 453, 458 (1958)

We submit, too, that these limitations on administrative power—fashioned in cases dealing with remedial orders as to which the agencies have a special expert capacity—are even more appropriately required where, as here, the order involved imposes a penal sanction rather than a remedy. So far as the application of penal sanctions is concerned that specialized capacity of the administrative agency is reduced in significance. In light of the fact that the order of the administrative agency in this case not only revokes the petitioners' registrations as broker and futures commission merchant but precludes them from trading on the mercantile exchange it destroys Miller's capacities to operate as a dealer in eggs. In similar circumstances, where the question was whether a person was to be prevented from practicing his profession, as Miller has been forbidden to do here, this Court recently said:

> "* * * While this is not a criminal case, its consequences for Konigsberg take it out of the ordinary run of civil cases. The Committee's action prevents him from earning a living by practicing law. This deprivation has grave consequences for a man who has spent years of study and a great deal of money in preparing to be a lawyer." *Konigsberg* v. *State Bar of California*, 353 U. S. 252, 257-58 (1957).

So too, how severe the consequences here, where the individual concerned has devoted the greater part of his life to the practice of his profession. It is submitted that Congress did not intend to leave such power in the administrative agency free from the power of modification by the reviewing court.

III.

THE QUESTION WHETHER A RETIRED JUDGE ASSIGNED TO "ACTIVE" DUTY PURSUANT TO 28 U. S. C. § 294 SHALL BE PERMITTED TO PARTICIPATE IN A REHEARING EN BANC OF A CASE IN WHICH HE SAT AS A MEMBER OF THE ORIGINAL PANEL IS A QUESTION OF RECURRING IMPORTANCE WHICH HAS NOT BEEN DECIDED BY THIS COURT AND WHICH WAS ERRONEOUSLY DECIDED BY THE COURT BELOW.

The original panel of the Seventh Circuit which passed on this case consisted of Judges Major, Schnackenberg, and Parkinson. Judge Major is a retired circuit court judge performing the same duties as the other judges of the circuit by designation and assignment pursuant to 28 U. S. C. § 294(b). On the first rehearing, he and Judge Schnackenberg decided over the dissent of Judge Parkinson that the penalty imposed by the respondents was unduly harsh and severe and exceeded allowable bounds under the Commodity Exchange Act. When rehearing *en banc* was granted on respondents' motion, despite the fact that respondents had filed no argument at the time of the first rehearing, a majority of the other judges of the Court of Appeals ruled that Judge Major was ineligible to participate in the rehearing *en banc*. This decision rested on an erroneous interpretation of the word "active" in 28 U. S. C. § 46, which provides that: "A court in banc shall consist of all active circuit judges of the circuit."

It is respectfully submitted that a retired circuit judge who has been designated and assigned to judicial duties commensurate with those of the other circuit judges, as provided by 28 U. S. C. § 294(b), is an "active" judge during the period of the designation. The title of § 294 substantiates this point, for it reads: "Assignment of

retired justices and judges to active duty". This construction is further supported by § 296 of Title 28, which provides that a judge so designated "shall have all the powers of a judge of the court, circuit or district to which he is designated and assigned, except the power to appoint any person to a statutory position or to designate permanently a depository of funds or a newspaper for publication of legal notices."

The importance of the question is underlined by the large number of retired judges available for "active" service under the provisions of § 294. As revealed in volume 256 of the Federal Reporter, Second Series, the last bound volume available to petitioners: four of the nine judges of the Second Circuit are retired judges (now to be designated "Senior Judges"), two of the four judges of the Fourth Circuit are retired judges,* three of the ten judges of the Fifth Circuit are retired judges, one of the seven judges of the Seventh Circuit is a retired judge, one of the eight judges of the Eighth Circuit is a retired judge, four of the ten judges of the Ninth Circuit are retired judges, and two of the seven judges of the Tenth Circuit are retired judges. Certainly a retired judge ought not to be called back to "active" duty solely for the purpose of participating in rehearings *en banc*. But no good reason exists why these judges who have received designations and assignments to active duty, an assignment and designation which testifies to their capacity, should be prohibited from participating in rehearings *en banc* especially in those cases in which they were assigned to the original panel. The harmful results of such disqualification are revealed in the instant case. Only three judges had heard the argument and

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* In the Fourth Circuit, a three-judge panel cannot be assembled from the court's "active judges," as that term was construed by the Court of Appeals below.

considered the briefs in the original hearing at which time the evidence was fully analyzed for the benefit of the court by both petitioners and respondents. These judges divided on the question whether the penalty was unduly disproportionate to the evidence adduced. One of the majority on this question was Judge Major. He was disqualified from participating in the rehearing with the result, as Judge Schnackenberg has said, that "not only his vote, but the benefit of his mature judgment in conference with the other members of the court, were lost."

The statute certainly does not require such disqualification. The erroneous construction of the statute by the Court of Appeals for the Seventh Circuit calls for correction by this Court.

CONCLUSION.

For the reasons heretofore set forth, it is respectfully submitted that this Court should issue a writ of certiorari to the United States Court of Appeals for the Seventh Circuit to review this case.

Respectfully submitted,

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APPENDIX A.

In the

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

No. 11959 September Term 1957—September Session 1957

G. H. MILLER AND COMPANY, *et al.*, *Petitioners*,

v.

UNITED STATES OF AMERICA and EZRA TAFT BENSON, Secretary of Agriculture of the United States, *Respondents*.

On Petition for Review of an Order of the Secretary of Agriculture.

January 7, 1958

Before MAJOR, SCHNACKENBERG and PARKINSON, *Circuit Judges*.

PARKINSON, *Circuit Judge*. The petitioners have filed a petition in this court to review and set aside an order of the Secretary of Agriculture entered by the Judicial Officer acting pursuant to the authority delegated thereby in a disciplinary proceeding under section 6(b) of the Commodity Exchange Act, 7 U.S.C.A. §9, revoking the registration of the petitioner G. H. Miller and Company as a futures commission merchant and the registration of the petitioner Gilbert H. Miller as a floor broker, and denying all trading privileges of the other petitioners for periods ranging from sixty days to one year.

The cause involves egg transactions on the Chicago Mercantile Exchange during the month of December 1952. To

those familiar with the operation of the Exchange eggs are referred to as *cash eggs* which are either *fresh eggs*, if they have not been in cold storage or if placed in cold storage have not been there for more than 29 days, or *refrigerators*, if they have been in cold storage for more than 29 days. A *carlot* consists of 480 cases with 30 dozen eggs in each case.

Deliverable eggs are cash eggs that may be delivered in satisfaction of futures contracts. *Futures contracts* or *futures* are contracts under which the seller agrees to sell and deliver cash eggs in a specified month and the buyer agrees to accept and pay for the eggs when delivered at the contract price. The buyer is a *long* and the seller is a *short* and the month designated for delivery is the *delivery month* or *contract month*.

The complaint charged in substance that the ten petitioners acted collectively and in a uniform manner pursuant to an understanding or agreement to corner and manipulate the egg market. It specifically charged purchases of December 1952 egg futures on December 17, 18 and 19; withholding such futures from sale during those three days; selling futures during December 22 and 23, the last two days of trading, at maximum prices; requiring and receiving delivery of December futures with knowledge by petitioners of an insufficient supply of deliverable eggs and the further knowledge that the major portion of such deliverable eggs were in their possession; withholding cash eggs from sale during the period of trading in December futures, and refusing to sell such eggs after the close of December futures trading except at a premium over prevailing prices for cash refrigerator eggs and thereby attempted to corner and did in fact corner and attempted to and did in fact manipulate the price of a commodity in interstate commerce and for future delivery on or subject to the rules of the Board of Trade in violation of the Commodity Exchange Act.

Hearings were held before a referee. Evidence was presented by the government but none was offered by the

petitioners. The Referee issued his report which contained recommended findings and conclusions to which the petitioners filed exceptions.

Arguments were then presented to the Judicial Officer. He made findings of fact and stated conclusions of law thereon and entered the decision and order herein sought to be set aside by the petitioners.

Section 6(b) of the Commodity Exchange Act, Title 7 U.S.C.A. §9, provides that "the findings of the Secretary of Agriculture as to the facts, if supported by the weight of evidence, shall * * * be conclusive." This court has heretofore held that to mean the preponderance or greater weight of the evidence. *General Foods Corporation* v. *Brannan*, 7 Cir., 1948, 170 F. 2d 220. However, in this case the petitioners offered no evidence and if a plaintiff establishes a prima facie case and the defendant offers no evidence in defense the plaintiff has discharged the burden of proof by a preponderance or greater weight of the evidence. *Lilienthal* v. *U. S.*, 1878, 97 U.S. 237, 267. Accordingly if the evidence in the record now before us established a prima facie case on behalf of the government the findings are supported by the weight of the evidence and are conclusive.

The petitioners concede that the "findings of actual facts consisting largely of market and trading statistics are not disputed". The evidence is that on December 16, 1952 the petitioners held 46 long December egg futures contracts, or 13.98% of the total increasing their position to 216 long December futures on December 19, or 77.98% of the total, and at the close of trading on December 22 the petitioners held 200 long futures which was 100% of the total and on December 23 they held 66 long futures which was also 100% of the total on that date. The petitioners also owned 19.5% of the deliverable refrigerator eggs in Chicago on December 16 and their holdings were increased to 72.1% on December 23 and to 98.7% on December 31. On December 17 the holders of 19 short futures could not liquidate their contracts without resorting to the

petitioners, to fresh eggs or to out-of-town storage eggs, and at the close of trading on the three days prior to the last day of trading, December 18, 19 and 22, (the 20th and 21st fell on Saturday and Sunday) the number of short futures which could not be otherwise liquidated was 98, 134 and 128, respectively. On the last day of trading, December 23, the holders of 106 short futures liquidated their positions by purchasing futures contracts from the petitioners and at the close of trading 66 December contracts were open on the Exchange and 33 thereof could not be liquidated without resorting to petitioners, to fresh eggs or to out-of-town storage eggs. An almost prohibitive time element was here involved in acquiring fresh eggs and, even if procurable, the price thereof would have been no less than a short would have to pay in resorting to petitioners; that refrigerator eggs stored in out-of-town warehouses had to be tendered prior to 7 A. M. on December 24 and even if available were so negligible that the petitioners still had control over the cash egg supply.

There was also evidence that the maximum rise in futures price permitted by the Exchange was two cents per day and on December 18, 19 and 22 the futures price rose to the maximum allowable amount each day, and as the result of the manipulation of the petitioners an artificially high price was created producing a profit to the petitioners in the sum of $162,695.15; that the petitioners cornered the December 1952 egg futures market on the Chicago Mercantile Exchange and manipulated the prices of December 1952 egg futures contracts and refrigerator eggs in Chicago.

There was also positive testimony that the shorts were "squeezed" by the petitioners and we believe the following conversation in evidence between one of the shorts and the petitioner Gilbert H. Miller is most significant:

> "Q. Tell us about your negotiations with Mr. Miller, concerning that purchase on the 30th.
>
> A. Well, I called Gil, and I said, 'Gil, you know I am short two cars of eggs, and I understand you are

the only one who has the eggs for delivery. I would like to purchase.' So, he says, '*Are you in this deal?*' He said, '*Gee, I'm sorry you happen to be in it.*' So we started to talk. I said, 'Well, you want to sell me two cars of eggs?' 'Yes, I will sell you two cars of eggs.' I said, 'What do you want for them?" He said, 'I want a cent over the closing option.'

Q. What was that?

A. 48 and a half cents.

Q. The closing option was 47 and a half?

A. Yes, I said, '48 and a half cents for storage eggs?' I said, 'That is ridiculous.' He said, 'How much do you think these eggs are worth?' I said, 'They are worth about 35, 36 cents, at the most 38 cents.' But inasmuch as I did not want to default, I bought two cars of eggs, which I feel I overpaid at least 12 cents a dozen for delivery on the Exchange."

To us this is indicative of the fact that the petitioners had a corner; that they knew it and had the shorts on their knees and at their mercy.

The Judicial Officer found that the concentrated long position of the petitioners constituted a large, dominant and controlling interest which was the result of concerted action by the petitioners and that the petitioners manipulaed prices of both December 1952 egg futures on the Chicago Mercantile Exchange and deliverable cash refrigerator eggs in Chicago and cornered the market in violation of the Commodity Exchange Act.

We believe that our decision in *Great Western Food Distributors* v. *Brannan*, 7 Cir., 1953, 201 F. 2d 476 is determinative of this case. Basically the facts are quite similar, moreover, in Great Western the petitioners testified in their own defense and offered evidence to controvert that introduced by the government while here the petitioners sat silently by and offered no evidence on their behalf whatsoever.

The petitioners contend that they did not need to because the government failed to sustain the burden of proof by a preponderance of the evidence. However, a careful reading of this record will disclose that the findings of

the Judicial Officer and his conclusions that the petitioners cornered the egg market on the Chicago Mercantile Exchange in December 1952 and manipulated the price in violation of the Commodity Exchange Act were sustained by a preponderance or the greater weight of the evidence.

We are fully cognizant of the fact that corners can unintentionally develop and that it is almost impossible to prove by direct evidence that the acts and transactions of the petitioners were undertaken pursuant to an understanding or agreement to act collectively and in a uniform manner. Proof of such concerted action and the intent to so act must generally be circumstantial unless one or more of the participants would so admit. However, the evidence in this record discloses a long chain of circumstances which definitely established prima facie that the petitioners did so act with the intent that their combined acquisitions would cause an artificial price increase and enable them by pressure to unjustly liquidate their holdings at a profit.

We recognize that the burden upon the government to prove its case by a preponderance of the evidence cannot be met by failure of the petitioners to testify or call witnesses in their behalf but the failure of the petitioners to testify, after the introduction of evidence establishing a prima facie case by the government, most assuredly creates a presumption that their testimony would have been unfavorable to them. *Bowles* v. *Lentin*, 7 Cir., 1945, 151 F. 2d 615, 619. We are in complete accord with the thought expressed by Mr. Justice Frankfurter in his concurring opinion in the case of *Adamson* v. *California*, 1947, 332 U.S. 46 when on page 60 he says:

> "Sensible and just-minded men, in important affairs of life, deem it significant that a man remains silent when confronted with serious and responsible evidence against himself which it is within his power to contradict."

In respect to the other questions raised and argued we are satisfied no error exists and further discussion would serve no purpose other than to unnecessarily extend this opinion.

The petition to review and set aside the order is denied.

APPENDIX B.

In the

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

No. 11959 September Term 1957 — January Session 1958

G. H. MILLER AND COMPANY, *et al.*, *Petitioners,*
v.
UNITED STATES OF AMERICA and EZRA TAFT BENSON, Secretary of Agriculture of the United States, *Respondents.*

On Petition for Review of an Order of the Secretary of Agriculture.

February 26, 1958

On Petition for Rehearing

SCHNACKENBERG, *Circuit Judge.* On their petition for rehearing, G. H. Miller and Company and Gilbert H. Miller, petitioners, ask us to modify the disciplinary order entered against them by the Secretary of Agriculture.

The penalties imposed by the Secretary are too harsh. I would modify said order so as to reduce the penalty imposed on Miller and Company so that its registration as a futures commission merchant would be suspended for six months rather than revoked, and the registration of Gilbert H. Miller as a floor broker would be suspended for a period of six months rather than revoked; and further that both of said petitioners be prohibited, directly or indirectly, from trading speculatively on any contract

market for a period of one year, and that during said period futures contracts may be executed providing they are clearly bona fide hedges against the cash commodity actually possessed by G. H. Miller and Company or Gilbert H. Miller, and all contract markets shall refuse to said G. H. Miller and Company and Gilbert H. Miller the right to so trade speculatively on their exchanges for a period of one year.

Our right to make such modifications has not been challenged by respondents. Counsel for respondents notified the clerk of this court that no reply would be filed to the petition for rehearing "inasmuch as" it consists "merely of a reargument of the issues which have been previously briefed and argued".

As to other points presented in the petition for rehearing, I vote to deny the same.

MAJOR, *Circuit Judge*. I agree with Judge Schnackenberg that the penalties imposed in this matter are too severe. I agree with his opinion on the petition for rehearing and vote to deny under the same conditions as he has.

PARKINSON, *Circuit Judge*. The petition for rehearing should be denied.

This court has no power or right to reduce a penalty imposed by the respondent which is within the statute. In the case of *Federal Trade Commission* v. *C. E. Niehoff & Co.*, 355 U.S. ....., decided on January 27, 1958, the Supreme Court reversed this court for changing a forthwith cease and desist order to take effect at a future time and held as follows:

> "In view of the scope of administrative discretion that Congress has given the Federal Trade Commission, it is ordinarily not for courts to modify ancillary features of a valid Commission order. This is but recognition of the fact that in the shaping of its

remedies within the framework of regulatory legislation, an agency is called upon to exercise its specialized, experienced judgment."

Accordingly we have no right to substitute our judgment for that of the respondent. The penalty affixed by the respondent was within the statutory limits. Whether we believe it to be too severe or otherwise is not within our power to determine.

To paraphrase the language of the Supreme Court in *Niehoff* the respondent alone is empowered to develop that enforcement policy best calculated to achieve the ends contemplated by Congress.

I would deny the petition for rehearing.

APPENDIX C.

In The
UNITED STATES COURT OF APPEALS
For the Seventh Circuit

No. 11959 SEPTEMBER TERM 1958 - SEPTEMBER SESSION 1958

G. H. MILLER AND COMPANY, et al., *Petitioners*,
v.
UNITED STATES OF AMERICA and EZRA TAFT BENSON, Secretary of Agriculture of the United States, *Respondents*.

On Rehearing By The Court En Banc

September 23, 1958

Before DUFFY, *Chief Judge*, FINNEGAN, SCHNACKENBERG, HASTINGS and PARKINSON, *Circuit Judges*, on rehearing by the court *en banc*.

PARKINSON, *Circuit Judge*. These proceedings originated in this court on a petition to set aside an order of the Secretary of Agriculture revoking the registration of G. H. Miller and Company as a futures commission merchant and Gilbert H. Miller as a floor broker and denying all trading privileges to the other petitioners for periods ranging from sixty days to one year and to cancel all sanctions imposed. There were fifteen petitioners in all.

A panel consisting of Judge Major, a former chief judge now retired but voluntarily rendering meritorious service as a member of this court, and Judge Schnackenberg, an

able circuit judge in active service, and the writer of this opinion heard the case and handed down a written opinion denying the petition.

Two of the fifteen petitioners, G. H. Miller and Company and Gilbert H. Miller, filed a petition for rehearing wherein they asserted that Miller was* in fact a damaging participant to the alleged manipulative scheme but if not at the most "[a]n objective analysis we submit will place Miller in the category of the lowest participant" and implored this court to reduce the penalties because they were "excessive" submitting an order as to them for entry as follows:

> "The registration of G. H. Miller and Company as a futures commission merchant and the registration of Gilbert H. Miller as a floor broker is suspended for a period of six months from the effective date of this order.
>
> With the effective date of this order G. H. Miller and Company and Gilbert H. Miller, directly or indirectly, shall be prohibited from trading speculatively on any contract market for a period of one year. During that period futures contracts may be executed providing they are clearly bona fide hedges against the cash commodity actually possessed by G. H. Miller and Company or Gilbert H. Miller and all contract markets shall refuse to said G. H. Miller and Company and Gilbert H. Miller the right to so trade speculatively on their exchanges for a period of one year."

On Millers' petition for rehearing Judge Schnackenberg, being of the opinion that "penalties imposed by the Secretary are too harsh", and Judge Major, believing "that the penalties imposed in this matter are too severe", the court ordered the penalty as to Millers reduced. The writer of this opinion dissented. The order was practically verbatim with the submitted form of order hereinabove set out. It reads as follows:

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* The word "not" has obviously been omitted.

"The registration of G. H. Miller and Company as a futures commission merchant is suspended for six months and the registration of Gilbert H. Miller as a floor broker is suspended for a period of six months, and both of said petitioners are prohibited, directly or indirectly, from trading speculatively on any contract market for a period of one year, and during said one year period futures contracts may be executed providing they are clearly bona fide hedges against the cash commodity actually possessed by G. H. Miller and Company or Gilbert H. Miller, and all contract markets shall refuse to said G. H. Miller and Company and Gilbert H. Miller the right to so trade speculatively on their exchanges for a period of one year."

In order to resolve the question as to the proper function of the Court of Appeals in proceedings to set aside an order of an administrative agency fixing a penalty within the statutory limits we granted a rehearing before the full court *en banc*.

Section 6(b) of the Commodity Exchange Act, Title 7 U.S.C.A. §9 provides that the Secretary of Agriculture may suspend, for a period not to exceed six months, or *revoke*, the registration of a futures commission merchant or a floor broker registered under the Act who violates any provision thereof. Accordingly the penalties fixed in the order did not exceed and were within the limits of the statute.

In *Great Western Food Distributors* v. *Brannan*, 7 Cir., 1953, 201 F. 2d 476, 484, involving an order fixing penalties under the Commodity Exchange Act, we held that "we have nothing to do with the question of severity of the penalty."

In *National Lead Company* v. *Federal Trade Commission*, 7 Cir., 1955, 227 F. 2d 825, we ordered stricken from a general cease and desist order of the Commission a provision directing each respondent individually to cease and desist from adopting the same or a similar system of pricing for the purpose of "matching" the prices of com-

petitors. The Supreme Court reversed, 352 U.S. 419, and restored the stricken provision:

In *Federal Trade Commission* v. *C. E. Nichoff & Co.*, (*Moog Industries, Inc. v. Federal Trade Commission*), 1958, 355 U.S. 411, the Supreme Court reversed this court which had changed a forthwith cease and desist order so that it took effect at a future time. It held that "it is ordinarily not for courts to modify ancillary features of a valid Commission order."

In *Arrow Metal Products Corporation* v. *Federal Trade Commission*, 3 Cir., 1957, 249 F. 2d. 83, 85, the Third Circuit, under similar circumstances as here, correctly defines the function of the Court of Appeals in the following language:

> "The petitioners complain that the cease and desist order is too drastic and that some other manner of preventing deception, if any, should be adopted. But the matter of shaping a remedy is for the Commission. Our function is simply, in the words of the Supreme Court, to find whether the Commission has made 'an allowable judgment in its choice of the remedy.' *Jacob Siegel Co.* v. *Federal Trade Commission*, 1946, 327 U.S. 608, 612, 66 S. Ct. 758, 760, 90 L. Ed. 888."

It is, therefore, clear to us that if the order of an administrative agency finding a violation of a statutory provision is valid and the penalty fixed for the violation is within the limits of the statute the agency has made *an allowable judgment in its choice of the remedy* and ordinarily the Court of Appeals has no right to change the penalty because the agency might have imposed a different penalty.

The petitioners Miller insist that the penalty here is more severe than any penalty imposed upon any other violator of the Act and cite cases where a lesser penalty was affixed. We are not impressed by such a specious argument.

The very most which can be said for the position of the petitioners Miller is that the penalty must have some "reasonable relation to the unlawful practices found to exist". *Federal Trade Commission* v. *National Lead Co.*, 1957, 352 U.S. 419, 429. This court, in *Daniels* v. *United States*, 7 Cir., 1957, 242 F. 2d 39, 42, held that "[t]he Administrative decision as to the remedy should be sustained unless the remedy selected has no reasonable relation to the practice found to exist."

The Judicial Officer concluded from his findings of fact, adequately supported by a preponderance of the evidence, that "[t]he violations of sections 6(b) and 9 of the act found herein are of serious and far-reaching consequences." He also concluded that Miller "was obviously the captain of the 'team' that effectuated what he described to Morris Weinger as the 'deal' in which he was sorry to find Weinger caught."

In the application of the rule that Courts of Appeal must sustain the remedy selected by an administrative agency unless it has no reasonable relation to the practice found to exist we find in this record no lack of reasonableness in the penalty imposed upon Millers. To the contrary the record establishes a direct relation between the penalty and the violation. To paraphrase the language of the Supreme Court in *Chicago Board of Trade* v. *Olsen*, 1923, 262 U.S. 1, 39, manipulations of egg futures for speculative profit, though not carried to the extent of a corner or complete monopoly, exert a *vicous influence* and produce abnormal and disturbing temporary fluctuations of prices that are not responsive to actual supply and demand and discourage not only justifiable hedging but disturb the normal flow of actual consignments. Here the petitioners, with Miller as the prime factor, did corner the egg market on the Chicago Mercantile Exchange in December, 1952. The penalties affixed were certainly commensurate with the violation and in their imposition the Secretary of Agriculture did not abuse his discretion.

The order herein entered on February 26, 1958 is vacated and set aside.

The petition to set aside the order of the respondent Secretary of Agriculture issued through the Judicial Officer on September 26, 1956 is denied.

FINNEGAN, *Circuit Judge*, concurring. This matter first came to our Court on a petition to review a decision and order, dated September 25, 1956, of the Judicial Officer[1] of the United States Department of Agriculture. At the administrative level this was a disciplinary proceeding under the Commodity Exchange Act.[2] All of the respondents joined in a 62-page petition for reconsideration and reargument submitted to the Judicial Officer, after his Decision and Order was issued for the Department of Agriculture, expressly seeking inter alia reconsideration of "the extent of penalties assessed." Counsel for the Commodity Exchange Authority filed an answer to that petition before the Secretary of Agriculture.

Point V of the brief filed on the merits for the United States and the Secretary of Agriculture, in our Court on October 31, 1957, was: "The Administrative Sanction should be Sustained;" and the point was briefed and authorities in support discussed. Petitioners' original brief filed August 2, 1957 in our Court is silent on the "sanctions." Apparently it was not until three judges of our Court denied the petition for review that G. H. Miller and Company and Gilbert H. Miller decided there was little else left to do but attack the administrative remedy invoked against them.

Section 6(b) of the Commodity Exchange Act[3] provides:

> "If the Secretary of Agriculture has reason to believe that any person (other than a contract market) is violating or has violated any of the provisions of this chapter, or any of the rules and regulations made

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[1] The Judicial Officer acted for the Secretary of Agriculture pursuant to authority delegated to him. 10 F. R. 13769; 11 F. R. 177A-233; 18 F. R. 3219; 18 F. R. 3648; 19 F. R. 74.

[2] Act of September 21, 1922, c. 369, 42 Stat. 998, as amended by the Act of June 15, 1936, c. 545, 49 Stat. 1491, as amended, 7 U. S. C. § 1, et seq. (1952 ed.) The phrase "to affirm, to set aside, or modify . . ." has been in the Act since 1922.

[3] 7 U.S.C. § 9 (1952 ed.)

pursuant to its requirements, or has manipulated or is attempting to manipulate the market price of any commodity, in interstate commerce, or for future delivery on or subject to the rules of any board of trade, he may serve upon such person a complaint stating his charges in that respect, to which complaint shall be attached or contained therein a notice of hearing, specifying a day and place not less than three days after the service thereof, requiring such person to show cause why an order should not be made directing that all contract markets until further notice of the Secretary of Agriculture refuse all trading privileges to such person, and to show cause why the registration of such person, if registered as futures commission merchant or as floor broker hereunder, should not be suspended or revoked. Said hearing may be held in Washington, District of Columbia, or elsewhere, before the Secretary of Agriculture, or before a referee designated by the Secretary of Agriculture, which referee shall cause all evidence to be reduced to writing and forthwith transmit the same to the Secretary of Agriculture. Upon evidence received, the Secretary of Agriculture may require all contract markets to refuse such person all trading privileges thereon for such period as may be specified in the order, and, if such person is registered as futures commission merchant or as floor broker hereunder, may suspend, for a period not to exceed six months, or revoke, the registration of such person. Notice of such order shall be sent forthwith by registered mail or delivered to the offending person and to the governing boards of said contract markets.

"After the issuance of the order by the Secretary of Agriculture, as aforesaid, the person against whom it is issued may obtain a review of such order or such other equitable relief as to the court may seem just by filing in the United States court of appeals of the circuit in which the petitioner is doing business a written petition praying that the order of the Secre-

tary of Agriculture be set aside. A copy of such petition shall be forthwith served upon the Secretary of Agriculture by delivering such copy to him, and thereupon the Secretary of Agriculture shall forthwith certify and file in the court a transcript of the record theretofore made, including evidence received. Upon the filing of the transcript the court shall have jurisdiction to affirm, to set aside, or modify the order of the Secretary of Agriculture, and the findings of the Secretary of Agriculture as to the facts, if supported by the weight of evidence, shall in like manner be conclusive."

That the remedies used at the administrative level in this case are within the statutory range of § 6(b) was and still is uncontested. When G. H. Miller and Company and Gilbert H. Miller filed their consolidated petition for "Rehearing and Modification," on January 22, 1958, they asked for a modification of the "excessive penalties assessed against" the petitioners. That petition was the aftermath of the unanimous opinion reported as *G. H. Miller and Company* v. *United States of America, et al.*, ... F. 2d ..... (7th Cir. 1958). An opinion on rehearing was filed February 26, 1958, later implemented by an order, showing that Judges Major and Schnackenberg agreed the "penalties" imposed were "too severe" and "too harsh." Judge Parkinson who wrote the initial opinion, dissented to the opinion of February 26, 1958. Judges Major and Schnackenberg voted to deny the Millers' petition for rehearing on all other points presented; Judge Parkinson unqualifiedly voted to deny that petition for rehearing.

Understandably, the government petitioned for rehearing before the full Court sitting *en banc* and the current array of opinions flows from this last hearing.

The significance of this historical background lies in the fact that the initial unanimous opinion, handed down January 8, 1958, was by three Judges who flatly refused to set aside the order of the Secretary of Agriculture and it is that order which underlies the administrative "penalties",

so-called, subsequently modified by two members of the original division of this Court, who first heard the petition for review of the Secretary's order.

I.

Consequently, the question now before us, as I view it, is just how much we can tinker with the Secretary's legal suspension and revocation of trading privileges—concededly within the statutory range—based upon the judicially approved administrative order issued by the Secretary. Indeed, § 6(b) states, *inter alia*: ". . . the findings of the Secretary of Agriculture as to the *facts*, if supported by the weight of evidence shall in like manner be *conclusive*." The three judges of our Court recognized this provision in their first opinion, and refused to disturb that phase of the case on rehearing number one.

Civil remedies and criminal punishments are both prescribed by the Commodity Exchange Act. See 7 U.S.C. § 13 and it must be borne in mind that we are not here concerned with a criminal case. Regardless of dramatic catch phrases, *i. e.*, "economic death," we are confronted only with statutory devices committed by the Congress to the Secretary's discretion, for the purpose of policing the market place. To be sure, revocation is a drastic step yet it must be assayed in the environment of the Commodity Exchange Act and the fact these petitioners were exercising a privilege. Another proceeding, *Nelson* v. *Secretary of Agriculture*, 133 F. 2d 453, 456 (7th Cir. 1943) under the Commodity Exchange Act gave rise to proceedings to set aside an order of the Secretary of Agriculture and Judge Lindley, writing for the division of Judges, said:

> "In permitting petitioner to buy and sell grain for future delivery on contract markets, the Government has in effect granted him a privilege. Suspension of such a privilege for failure to comply with the statutory standard is merely withdrawal by the Government of permission to engage in a business affected with the National public interest in which the person

has no inherent right to engage, but in which he may participate only upon compliance with conditions imposed by Congress in the exercise of its power over Commerce. Inasmuch as Congress has the power to fix conditions upon which petitioner may engage in trading on the market . . . it may, through an administrative agency, withdraw the privilege for violation of these conditions . . ."

A similar position was taken by the First Circuit in *Nichols & Co. v. Secretary of Agriculture*, 131 F. 2d 651, 659 (1st Cir. 1942): "We believe that suspension of a registrant is not primarily punishment for a past offense but it is necessary power granted to the Secretary of Agriculture to assure a proper adherence to the provisions of the Act."

Chief Judge Duffy has followed the same line of thinking when reviewing a suspension order of a Judicial Officer of the United States Department of Agriculture, issued under the Packers and Stockyards Act, 7 U. S. C. § 181, *et seq.*, in *Cella v. United States*, 208 F. 2d 783, 789 (7th Cir. 1953).

Cella was cited and quoted in the brief filed for the government in *Daniels v. United States*, 242 F. 2d 39 (7th Cir. 1957) and used in that opinion by Chief Judge Duffy. Under "contested issues" in the Daniels' brief is this one: "3. The final issue is whether or not the suspension order should be set aside at this time on the grounds that, even under the present record, it is excessively harsh and oppressive." It was to this point then, that Chief Judge Duffy stated: "The Administrative decision as to the remedy should be sustained unless the remedy selected has no reasonable relation to the practice found to exist . . . In view of respondent's previous violations, the order, including the sanctions, should be approved." (242 F. 2d 39, 42).

"Equitable relief" mentioned in § 6(b), is not, in my opinion, Congressional authority for substituting our subjective attitudes concerning the quantum of sanction or duration of suspension of trading privileges for that of the Secretary. A common sense approach, I should think,

shows this to be nothing more than a recognition of the common garden variety of temporary injunction. Congress, in my view, simply recognized the usual questions arising in connection with enjoining orders of administrative agencies and made it clear that equitable relief could be invoked against the government. See *e. g.*, Davis, Administrative Law § 213 and § 217, Statutory Limitations on Enjoining Administrative Action. I do not believe "equitable relief" means we are to decide the extent of sanction for that power is expressly conferred on the Secretary (not the Courts) by § 6(b), and as I view it his power is so potent—and necessarily so to achieve the aims of this legislation—that injunctive relief is expressly authorized in order that the basis in fact for administrative action can be probed expeditiously, in appropriate cases, rather than await the run of a calendar of cases for review.

"Modify" is the target word lurking in § 6(b). What has been done in this case was to treat "modify" as a third exclusive remedy on a petition for review of the Secretary's order, *i. e.*, approve his order and modify his order of suspension or revocation of registration. At best, I think the general principles of administrative law would permit modification, by a Court of Appeals, only to the extent of unlawfulness of the Secretary's ruling or order. But so long as the Secretary makes findings of fact and they are based on evidence conforming to the statutory standards and he acts *intra vires* the relevant acts of Congress we cannot, in my opinion, modify sanctions because we personally think them "too harsh" or "too severe." To do otherwise ignores the expertise of the Secretary in the complexities of trading in futures. We can abdicate our judicial function by usurpation just as well as by abandonment to administrative agencies. Obviously all this goes further. Without the word "modify" in § 6(b), Courts of Appeal would have only two alternatives regarding the Secretary's final orders—affirm or set aside. But by using "modify" Congress allows some play in the joints, enabling a reviewing court to send back an order for further administrative action based upon some modification. Even

a cursory reading of the first portion of § 6(b) reveals the numerous grounds of administrative action, any one of which could be the basis of a lengthy record and detailed order. Rather than have an order set aside and the proceedings annulled, the word "modify" allows for adjustment between Court, parties and Secretary on some aspects of the order. There is nothing in § 6(b) indicating that the scope of judicial review has been enlarged to the point where periods of suspension, for example, can be either *increased* or decreased, or that revocations can be judicially converted into suspensions.

Much lays in the balance here if we merely glance at the word "modify" and let quick reaction turn us away from the broader question demanding our judicial attention. As part of his dissent to the majority in *United States* v. *Monia*, 317 U. S. 424, 431-432 (1943), Mr. Justice Frankfurter, caught the theme implicit in statutory interpretation problems:

> "The notion that because the words of a statute are plain, its meaning is also plain, is merely pernicious oversimplification. It is a wooden English doctrine of rather recent vintage . . . [citing], to which lip service has on occasion been given here, but which since the days of Marshall this Court has rejected, especially in practice . . . [citing] A statute, like other living organisms, derives significance and sustenance from its environment, from which it cannot be severed without being mutilated. Especially is this true where the statute, like the one before us, is part of a legislative process having a history and a purpose. The meaning of such a statute cannot be gained by confining inquiry within its four corners. . . ."

Though I have quoted from a dissent the concept and grasp of the problem is diminished not one whit because the author was not with the majority. Yet, if it be insisted only majority opinions deserve mention, then what Mr. Justice Reed wrote for the majority of a divided court in *U. S.* v. *American Trucking Association*, 310 U. S. 534, 542-544 (1940) will serve the purpose:

"In the interpretation of statutes, the function of the courts is easily stated. It is to construe the language so as to give effect to the intent of Congress. There is no invariable rule for the discovery of that intention. To take a few words from their context and with them thus isolated to attempt to determine their meaning, certainly would not contribute greatly to the discovery of the purpose of the draftsmen of a statute, particularly in a law drawn to meet many needs of a major occupation.

"There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning. When that meaning has led to absurd or futile results, however, this Court has looked beyond the words to the purpose of the act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' this court has followed that purpose, rather than the literal words. When aid to construction of the meaning of words, as used in the statute, in available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination'. The interpretation of the meaning of statutes, as applied to justiciable controversies, is exclusively a judicial function. This duty requires one body of public servants, the judges, to construe the meaning of what another body, the legislators, has said. Obviously there is danger that the courts' conclusion as to legislative purpose will be unconsciously influenced by the judges' own views or by factors not considered by the enacting body. A lively appreciation of the danger is the best assurance of escape from its threat but hardly justifies an acceptance of a literal interpretation dogma which withholds from the courts available information for reaching a correct conclu

sion. Emphasis should be laid, too, upon the necessity for appraisal of the purposes as a whole of Congress in analyzing the meaning of clauses or sections of general acts. A few words of general connotation appearing in the text of statutes should not be given a wide meaning, contrary to a settled policy, 'excepting as a different purpose is plainly shown.'"

While it may be urged we are not barred legislatively on the bare word "modify" I think the temporary urgency characterized by these petitioners as an "economic death sentence," fails in overriding broader principles controlling court-administrative relations. Virtually all final orders of federal administrative agencies have economic impact on the parties against whom they are directed; obviously such deprivations are the teeth in the statutes. Mr. Justice Douglas, delivering the Court's opinion in *F. P. C.* v. *Idaho Power Co.*, 344 U. S. 17, 21 (1952) wrote: "The Court, it is true, has power 'to affirm, modify, or set aside' the order of the Commission 'in whole or in part,' . . . But that authority is not power to exercise an essentially administrative function. See *Ford Motor Co.* v. *Labor Board*, 305 U. S. 364, 373-374; *Siegel Co.* v. *Federal Trade Commission*, 327 U. S. 608."

Chief Judge Swan, speaking for a division of the Second Circuit, observed in *Consumers Sales Corp.* v. *Federal Trade Commission*, 198 F. 2d 404, 408 (2nd Cir. 1952): "Our power to modify an order such as this, once an illegal trade practice has been found, is severely circumscribed [citing cases in a marginal note] but even if it were not we could find nothing improper about the Commission's efforts to prevent this scheme from reappearing in a slightly altered garb."

"It is a fundamental principle . . . that where Congress has entrusted an administrative agency with the responsibility of selecting the means of achieving the statutory policy 'the relation of remedy to policy is peculiarly a matter for administrative competence.'" *American Power Co.* v. *S. E. C.*, 329 U. S. 90, 112 (1946). One need only read

§ 5 of the Commodity Exchange Act, embodying the Congressional declaration of "the dangerous tendency of dealings in commodity futures," to commence understanding the reason why it supplied the Secretary with such drastic remedies:

> "Transactions in commodity involving the sale thereof for future delivery as commonly conducted on boards of trade and known as 'futures' are affected with a national public interest; such transactions are carried on in large volume by the public generally and by persons engaged in the business of buying and selling commodity and products and byproducts thereof in interstate commerce; the prices involved in such transactions are generally quoted and disseminated throughout the United States and in foreign countries as a basis for determining the prices to the producer and the consumer of commodity and the products and byproducts thereof and to facilitate the movements thereof in interstate commerce; such transactions are utilized by shippers, dealers, millers, and others engaged in handling commodity and the products and byproducts thereof in interstate commerce as a means of hedging themselves against possible loss through fluctuations in price; the transactions and prices of commodity on such boards of trade are susceptible to speculation, manipulation, and control, and sudden or unreasonable fluctuations in the prices thereof frequently occur as a result of such speculation, manipulation, or control, which are detrimental to the producer or the consumer and the persons handling commodity and products and byproducts thereof in interstate commerce, and such fluctuations in prices are an obstruction to and a burden upon interstate commerce in commodity and the products and byproducts thereof and render regulation imperative for the protection of such commerce and the national public interest therein."

Since the Secretary's order does not contravene any constitutional limitation, is within the constitutional and

statutory authority of the Secretary, and is supported by the requisite quantum and quality of evidence, I fail to see how we can set the order aside in part pertaining to the legal sanction or remedy given him to exclude persons from the trading privileges. These remedies are matters left specifically by Congress to the discretion of the Secretary; we fully perform our function on review by a determination that there has been a fair hearing, correct application of the relevant statutory provisions, and nothing contravening constitutional rights.

II.

In *C. E. Niehoff & Co.* v. *Federal Trade Commission*, 241 F. 2d 37 (7th Cir. 1957) the Commission's opinion contains this factor: "Stating that an order requiring the respondent to terminate its unlawful discriminations will destroy the Niehoff business when its competitors are not likewise enjoined, appellant [Niehoff] requests that this proceeding be held in abeyance until the Commission can place all industry members under identical restrictions. The pricing practices used by the respondent, however, have been found to be in violation of law. Since their continuance by the respondent is likewise unlawful the Commission's duty under the applicable statute is to require their termination forthwith . . ." 51 F. T. C. 1114. (See also Transcript of Record filed on certiorari, at page 1026).

On review of that Niehoff order and opinion I dissented (241 F. 2d 37, 43) because my two colleagues stated "the order against Niehoff is hereby modified by striking the word 'forthwith' therefrom and by adding to said order the following: 'This cease and desist order shall take effect at such time in the future as the United States Court of Appeals for the Seventh Circuit may direct, *sua sponte* or upon motion of the Federal Trade Commission.' As thus modified, the order is affirmed." Judge Major and Judge Schnackenberg invoked § 11 of the Clayton Act, 15 U. S. C. § 21 as their authority for such modification, and, of course, the word "modify" appears in that section of the Clayton Act.

When the Solicitor General, on behalf of the Federal Trade Commission, sought issuance of a writ of certiorari to review our judgment in *Niehoff*, the question presented in the petition was stated as: ". . . [W]hether the power of judicial review conferred by Section 11 of the Clayton Act authorizes the reviewing court to postpone the operative date of a Commission order adjudicated to be valid, for the declared purpose of rendering the order a nullity until like orders have been entered against respondent's 'competitors.'" (Petition for certiorari, p. 2). The brief in opposition to the government's petition responded to that issue and the question was thus crystallized for review by the Supreme Court. When certiorari was granted, both sides briefed that particular issue.

On review by the Supreme Court, *Niehoff* was taken together with *Moog Industries, Inc.* v. *Federal Trade Commission*, 355 U. S. 411, 414 (1958) where, in a *per curiam*, the Court ordered that the Niehoff judgment be ". . . vacated and the cause remanded to the Court of Appeals [Seventh Circuit] with directions to affirm the order of the Commission in its entirety." Reaching that result the salient portion of the *per curiam* opinion was as follows:

> "In view of the scope of administrative discretion that Congress has given the Federal Trade Commission, it is ordinarily not for courts to modify ancillary features of a valid Commission order. This is but recognition of the fact that in the shaping of its remedies within the framework of regulatory legislation, an agency is called upon to exercise its specialized, experienced judgment. Thus, the decision as to whether or not an order against one firm to cease and desist from engaging in illegal price discrimination should go into effect before others are similarly prohibited depends on a variety of factors peculiarly within the expert understanding of the Commission. Only the Commission, for example, is competent to make an initial determination as to whether and to what extent there is a relevant 'industry' within which the particular respondent competes and whether or

not the nature of that competition is such as to indicate identical treatment of the entire industry by an enforcement agency. Moreover, although an allegedly illegal practice may appear to be operative throughout an industry, whether such appearances reflect fact and whether all firms in the industry should be dealt with in a single proceeding or should receive individualized treatment are questions that call for discretionary determination by the administrative agency. It is clearly within the special competence of the Commission to appraise the adverse effect on competition that might result from postponing a particular order prohibiting continued violations of the law. Furthermore, the Commission alone is empowered to develop that enforcement policy best calculated to achieve the ends contemplated by Congress and to allocate its available funds and personnel in such a way as to execute its policy efficiently and economically.

"The question, then, of whether orders such as those before us should be held in abeyance until the respondents' competitors are proceeded against is for the Commission to decide. If the question has not been raised before the Commission, as was the situation in No. 77, a reviewing court should not in any event entertain it. If the Commission has decided the question, its discretionary determination should not be overturned in the absence of a patent abuse of discretion."

Certainly that opinion shrivelled the word "modify" in the section of the Clayton Act concerning our reviewing powers and the result understandable when read with an acute awareness of our relationship to the Commission. No doubt the luster of "modify" in pre-*Niehoff* days would be blinding unless read in the broad context of the administrative law problem.

The word "modify" employed in § 6(b) should not be construed to reach the statutory remedies given the Secretary unless those remedies, (called "penalties" when viewed from an offender's position) are shown to be

wholly without evidentiary support or *ultra vires* the enabling act of the Congress. Of course, if the order suspending a futures commission merchant or floor broker were unsupported by the "weight of evidence" we would be bound to set it aside. But "modifying" the remedy utilized by the Secretary when his order meets the statutory test, is unsound.

We should, I think, withhold substitution of our judgment of the extent of the Secretary's remedy when he acts within the scope of his statutory standards and administrative discretion. Congress entrusted the Secretary with these remedies to cope with market problems arising within his jurisdiction. Clearly the question of remedy, whether suspension or revocation, is peculiar to this case and these facts and consequently we ought not to interfere with particularized application of § 6(b) when there is absent any constitutional impingements and the Secretary's compliance with relevant statutes is unchallenged.

Our personal powers of discrimination might well discredit the degree of remedy invoked by the Secretary because it does not square with our individual judgments. But this can arise from circular thinking enclosing the record and our personal predilections rather than combining all of that with the Secretary's experience, knowledge and goal. After all this is a review, not a petition for enforcement of an administrative order. Here I do not wish to be misunderstood. I speak from a point of view confronting what I believe to be the judicial function in this situation which is not too well delineated by case precedent. On the record now before us the question is not whether the remedy is too harsh. Congress invested the Secretary with primary authority for selecting among statutory remedies the ones useful to achieve the purposes for which such power was granted. Whether facts found by the Secretary amount to a violation is a question of law for this Court. The initial judicial review answered that question favorably for the administrator, going further when no other error of law has been urged invades the province of discretion granted the Secretary. To

countenance judicial adjustment of sanctions imposed by the Secretary in this case makes a stalking horse out of the statutory word "modify."

SCHNACKENBERG, *Circuit Judge*, dissenting.

By this court's order the rehearing *en banc* was limited to this question: Does the Court of Appeals have the power and jurisdiction to change a penalty fixed by respondent Secretary of Agriculture, which penalty is within the statutory limits? In effect, Judge Parkinson's opinion answers this question in the negative. Inasmuch as I find myself in dissent, I deem it essential to state my reasons. The prior proceedings herein are partly set forth in Judge Parkinson's opinion, *supra*. His statement in that regard needs the following supplementation and clarification.

1. After retired Circuit Judge Major and I modified the original panel opinion written by Judge Parkinson, over his objection that this court "has no power or right to reduce a penalty imposed by this respondent which is within the statute", the order for the *en banc* hearing eliminated Judge Major from further consideration of the case (to which he had been regularly assigned). Thereby, not only his vote, but the benefit of his mature judgment in conference with the other members of the court, were lost. The only reason given for excluding Judge Major at that point was reliance upon 28 U.S.C.A. § 46 (c), which reads:

> "(c) Cases and controversies shall be heard and determined by a court or division of not more than three judges, unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in active service. A court in banc shall consist of all active circuit judges of the circuit."

This reasoning, however, overlooks other relevant sections of the statute. They are 28 U.S.C.A. § 294(b) and § 296.

which in their present form were enacted on June 25, 1948, 62 Stat. 901, which is the same day § 46 was enacted in its present form.

Sec. 294 (b) provides:

"Any retired circuit • • • judge may be designated and assigned to perform such judicial duties in any circuit as he is willing to undertake. Designation and assignment of such judge for service within his circuit shall be made by the chief judge • • •"

Sec. 296 provides:

"A • • • judge shall discharge, during the period of his designation and assignment, all judicial duties for which he is designated and assigned. He may be required to perform any duty which might be required of a judge of the court • • • to which he is designated and assigned.

"*Such • • • judge shall have all the powers of a judge of the court, • • • to which he is designated and assigned,* except the power to appoint any person to a statutory position or to designate permanently a depository of funds or a newspaper for publication of legal notices.

"A • • • judge who has sat by designation and assignment in another district or circuit may, notwithstanding his absence from such district or circuit or the expiration of the period of his designation and assignment, decide or join in the decision and final disposition of all matters submitted to him during such period and *in the consideration and disposition of applications for rehearing or further proceedings in such matters.*" (Emphasis supplied).

Judge Major, being willing to undertake the judicial duties to which he was assigned, sat on the three-judge panel which decided the case at bar and he concurred in the opinion of the court and the panel's modification of the order entered by the respondents. The designation and assignment to hear this case had not expired when a rehearing *en banc* was ordered and will not expire until

this case is finally disposed of in this court, because § 296 makes it clear that he may be required to perform any duty which might be required of a judge of this court, and certainly that would include participating in the final action on a petition for rehearing in this case. That function is included in the language of the second paragraph of § 296, which is to the effect that such a designated and assigned judge "shall have all the powers of a judge of the court to which he is designated and assigned", with certain irrelevant exceptions. Moreover, the third paragraph of § 296 is clear that, even if he were designated to sit in *another* circuit, neither his absence from said circuit or the expiration of the period of his designation and assignment would deprive him of the power to "decide or join in the decision and *final disposition* of all matters submitted to him during such period and *in the consideration and disposition of applications for rehearing or further proceedings in such matters.*" (Emphasis supplied.) *A fortiori*, Judge Major, having been designated and assigned to sit *in his own circuit*, the Seventh, does not have less power than if he had been designated and assigned to sit in *another* circuit.

We are not justified in attributing to congress an intention, by § 46, to prevent a judge, who actively sits on the panel which decides an appeal, from participating in an *en banc* hearing on a petition for rehearing, the object of which is to overturn a major part of the panel's decision. A reading of both § 294 (b) and § 296, in conjunction with § 46, dispels any such legislative intention. The only reasonable construction which can be given to the entire pertinent legislative language, in its application to this case, is that the designation and assignment of Judge Major to this case bestowed upon him the duty of acting as a judge therein and in the consideration and disposition of such applications for rehearing as have been or will be filed therein. It would be incredible that congress intended that an experienced and capable retired judge, who voluntarily accepts an assignment to hear a case in his own circuit and in the decision of which he has joined,

should be excluded from the consideration of a petition for rehearing thereof, whether or not it is to be heard by the original panel of which he is a member or the court sitting *en banc*. Such a result would be incongruous and contrary to common sense. Even if it could be urged that this construction involves a "sacrifice of literalness for common sense", I call attention to the apt language of Justice Douglas in *Textile Mills Corp.* v. *Comm'r.*, 314 U.S. 326, 334, where he said:

> "* * * any sacrifice of literalness for common sense does no violence * * *. Certainly, the result reached makes for more effective judicial administration. Conflicts within a circuit will be avoided. Finality of decision in the circuit courts of appeal will be promoted. Those considerations are especially important in view of the fact that in our federal judicial system these courts are the courts of last resort in the run of ordinary cases. Such considerations are, of course, not for us to weigh in case Congress has devised a system where the judges of a court are prohibited from sitting *en banc*. But where, as here, the case on the statute is not foreclosed, they aid in tipping the scales in favor of the more practicable interpretation."

To me, the legislative intent in enacting § 46 was to prevent the overturning of a panel decision by the loading of the court on an *en banc* hearing by bringing in a number of retired judges who had not been members of the original panel. That intent is based upon an obviously sound purpose, but the section should not be extended beyond that objective.

The views herein expressed find support in *U.S.* v. *Watkins*, 164 F.2d 457, (2 Cir.). There Justice Holtzoff of the District of Columbia was designated to sit in the District Court for the Southern District of New York. His first ruling was to amend the warrant of deportation there involved. He thereafter granted respondent's motion for reargument, and, after further hearing, changed his holding to agree with respondent and dismissed the writ of habeas corpus. It was held, at 460, that, although his

designation had already expired when he granted reargument, he was the proper judge to hear same. The court in a footnote cited *Frad* v. *Kelly*, 302 U.S. 312, 316, where the Supreme Court said:

> "When an assigned judge has presided at the trial of a cause, he is to have power, though the period of his service has expired, and though he may have returned to his own district, to perform the functions which are incidental and *supplementary to the duties performed by him* while present and acting in the designated district. And where a cause has been submitted to him in the designated district, after his return to his own district he may enter decrees or orders and file opinions necessary to dispose of the case, notwithstanding the termination of his period of service in the foreign district. * * *" (Emphasis supplied).

I believe that Judge Major is entitled to participate in this case until its final disposition in this court.

2. Judge Parkinson's opinion reveals no disagreement among members of the court as to the harshness of the penalty imposed by the administrative agency,—but disagreement only as to the court's *power* to restrain the agency when it seeks to inflict an unreasonable and harsh penalty. Here Judge Major and I have relied upon the heretofore undisputed power of courts to protect citizens from such a penalty. This court has exercised its jurisdiction to review the sanctions imposed by the Secretary of Agriculture, under the Packers and Stockyards Act, in *Daniels* v. *United States of America, and Ezra Taft Benson, Secretary of Agriculture*, 242 F.2d 39. Chief Judge Duffy, who wrote the court's opinion in that case, did not in any way indicate that this court had no power to pass upon a contention that the sanctions imposed by the Secretary of Agriculture were excessive. Instead he proceeded, at 42, to review the facts in the record bearing upon that contention and came to the conclusion that the record supported the sanctions imposed.

Traditionally, courts who find their historical roots in Anglo-Saxon jurisprudence have always been alert to strike down harsh or excessive penalties.

Legislatively, congress has expressly bestowed upon this court power to "*modify*" orders of the administrative agency here involved. 7 U.S.C.A. § 9 provides:

> "After the issuance of the order by the Secretary of Agriculture, as aforesaid, the person against whom it is issued may obtain a review of such order or *such other equitable relief as to the court may seem just* by filing in the United States court of appeals of the circuit in which the petitioner is doing business a written petition praying that the order of the Secretary of Agriculture be set aside. * * * the court shall have jurisdiction to affirm, to set aside, or *modify* the order of the Secretary of Agriculture, * * *." (Italics supplied.)

Both Judge Parkinson and the respondents have mistakenly relied upon *Federal Trade Commission* v. *C. E. Nichoff & Co.*, 355 U.S. 411, which held, in a Federal Trade Commission case, that we were correct in our holding, 241 F. 2d 37, at 42, where we said:

> "The commission takes the position that it has *no power to stay* compliance with its order. It relies upon a part of section 11 of the amended Clayton Act, contending that it has no discretion as to the enforcement of the law. It fails to cite that part of section 11 which provides that the commission 'shall issue * * * an order requiring such person to cease and desist from such violations * * * *within the time fixed by said order.' It is our opinion* that the statutory language *vests in the commission power to postpone* the time at which an order is to take effect." (Italics supplied for emphasis.)

It is true that, in order to induce the Federal Trade Commission to seek a review in the United States Supreme Court in the *Nichoff* case, we modified the Commission's order *sua sponte*, in view of the Commission's assertion that it had *no power* to stay compliance with its order.

The Commission thereupon took the case to the Supreme Court which *inter alia* sustained our holding that the Commission did have such power. It is apparent, therefore, that the Supreme Court agreed with us that the Commission had power to postpone the date for compliance with its order and that the Commission was mistaken in its stated position that it did not have that power. That was the principal question involved in the *Niehoff* case, as we had held that we would affirm the Commission's order on the merits.

Judge Parkinson's opinion in the *en banc* proceeding avoids the language of 7 U.S.C.A. § 9, *supra*, as to our power to grant "such other equitable relief as to the court may seem just" and our power to "modify the order of the Secretary of Agriculture", by simply not mentioning it. Why this crucial language in the statute is swept under the rug is not explained. Judge Parkinson does not in any way explain why the panel's changing of the order of the Secretary of Agriculture, by reducing the penalties imposed on G. H. Miller and Company and Gilbert H. Miller, did not amount to a modification of the order, as is expressly authorized by the Act. He has ignored the Act in that critical aspect. It would be interesting if Judge Parkinson or counsel for the Secretary of Agriculture had stated what the words "modify the order" mean. Do the words bestow upon this court the mere power to "cross the t's and dot the i's" in an agency's order? Judge Parkinson instead emphasizes the statutory grant of *power to the agency* to "*revoke*" a license.[1] Our cleavage is over the question of *our* power—not the power *of the agency*. Here we have express authority to affirm, set aside or *modify* the administrative order, and to grant equitable relief as to us may seem just. Those are the words of Congress. While congress has adopted a policy which recognizes the usefulness of a system of administrative agencies, it has seen the need for judicial control of such agencies, which usually exercise the multiple func-

[1] 7 U.S.C.A. § 9. It will be noted that this section does not require a revocation. Other alternatives are provided.

tions of instigating proceedings, gathering evidence, as well as prosecuting and acting as judges of those proceedings. Moreover, most Americans realize the need for judicial control because they see in the history of commissions and other administrative agencies no proof that they are infallible. The majority opinion would sustain in *all* cases the most severe penalty which the agency may be authorized by congress to impose in the most aggravated case, taking the position that we are powerless to restrain such abuse of authority. The mere statement of such a doctrine exhibits its utter speciousness.

While this is an obscure case, it is one which will shock all observers of the American scene, when its full import is realized. It marks a court's retreat from a long-established line of defense. The publication of the court's opinion will emerge as an outright abdication of a judicial protection upon which our citizens have hitherto justifiably and proudly relied.

In a nutshell we have here a situation in which an agency has imposed upon two citizens what is virtually economic death. To review the harshness of this action they came to the court designated by congress to review the agency's decisions. They are met by a refusal by that court to perform its function in this regard. Asserting its impotence, it abdicates its functions and leaves the citizens remediless.

The action of the original panel in modifying the order of the Secretary of Agriculture, as to the penalty imposed, was correct.

APPENDIX D.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago 10, Illinois

Friday, May 16, 1958

Before
Hon. F. Ryan Duffy, Chief Judge
Hon. Philip J. Finnegan, Circuit Judge
Hon. John S. Hastings, Circuit Judge
Hon. W. Lynn Parkinson, Circuit Judge

G. H. Miller And Company, et al.,
Petitioners,

vs.

No. 11959

United States Of America and
Ezra Taft Benson, Secretary of
Agriculture of the United States,
Respondents.

A majority of the Circuit Judges of this Circuit in active service having voted in favor of a rehearing en banc in the above entitled cause,

It Is Ordered, that a rehearing en banc shall be held and said rehearing shall be limited to the question—Does the Court of Appeals have the power and jurisdiction to change a penalty fixed by respondent Secretary of Agriculture, which penalty is within the statutory limits,

It Is Further Ordered that the briefs heretofore submitted in this cause shall be used upon the petition for rehearing, and that oral argument shall be limited to thirty minutes on a side.

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JAMES R. BROWNING, Clerk

No. 593

In the Supreme Court of the United States

OCTOBER TERM, 1958

GILBERT H. MILLER AND G. H. MILLER AND COMPANY,
PETITIONERS

v.

UNITED STATES OF AMERICA AND EZRA TAFT BENSON,
SECRETARY OF AGRICULTURE OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinions of the court of appeals on appeal (Pet. 1a–6a), on rehearing (Pet. 7a–9a), and on rehearing *en banc* (Pet. 10a–36a) are reported at 260 F. 2d 286. The findings and order of the Secretary of Agriculture (J.A. 1358–1402)[1] are reported at 15 Agric. Dec. 1015.

JURISDICTION

The judgment of the court of appeals on rehearing *en banc* was entered on September 23, 1958. The peti-

[1] "J.A." references are to the joint appendix in the court of appeals.

tion for a writ of certiorari was filed on December 19, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the findings of the Secretary of Agriculture that petitioners had violated the Commodity Exchange Act were supported by a preponderance of the evidence.

2. Whether the remedial provisions of the Secretary's order bore a reasonable relation to, and were commensurate with, the violations of the Act.

3. Whether a retired circuit judge who participates in the initial decision of the court of appeals is an "active" circuit judge entitled to participate in a rehearing *en banc* under 28 U.S.C. 46(c).

STATUTES INVOLVED

The relevant provisions of the Commodity Exchange Act, 7 U.S.C. 1, *et seq.*, and of the Judicial Code, 28 U.S.C. 46(c), are set forth in the petition (pp. 2–4).

STATEMENT

The complaint which instituted the administrative proceeding alleged that ten individuals and certain companies had acted collectively, pursuant to understanding or agreement, to corner and manipulate the December 1952 egg futures market on the Chicago Mercantile Exchange (J.A. 19). It alleged that the respondents, who included the present petitioners, attained a "dominant and controlling" long position in that market, obtained control of the supply of deliverable eggs in Chicago, and placed themselves in a posi-

tion where they could and did "exact such prices as they saw fit" from the holders of short December 1952 egg futures contracts, and thereby caused the price of December 1952 egg futures contracts on the Chicago Mercantile Exchange and the price of cash eggs deliverable in Chicago in December 1952 to rise to an "artificial and manipulated level" (J.A. 23).

Fifteen witnesses testified for the Government at the administrative hearing, and the respondents neither testified nor called any witnesses on their behalf. Upon the basis of the evidence, the Hearing Examiner found that the respondents agreed to and did corner December 1952 egg futures and cash refrigerator eggs in Chicago, manipulate and raise the price of such futures and eggs, and force the "shorts" to pay excessive prices therefor (J.A. 1293). The Hearing Examiner's proposed order recommended that the registration of G. H. Miller and Company as a futures commission merchant and the registration of Gilbert H. Miller as a floor broker be revoked and that all contract markets be required to refuse trading privileges to all of the respondents for various periods running from 60 days to one year (J.A. 1298–9).

The proceeding was heard by the Judicial Officer[2] on exceptions to the Hearing Examiner's report. After making extensive findings of fact (J.A. 1363–85), he concluded that the respondents had, by understanding or agreement and concert of action, manipulated prices of December 1952 egg futures on the Chicago Mercantile Exchange and deliverable cash re-

[2] The Judicial Officer acted for the Secretary of Agriculture under a delegation of authority for that purpose. 10 F.R. 13769; 11 F.R. 177A–233; 18 F.R. 3219; 18 F.R. 3648; 19 F.R. 74.

frigerator eggs in Chicago, and cornered the market (J.A. 1383, 1389, 1394, 1398). He stated that the violations of Sections 6(b) and 9 of the Act which he had found "are of serious and far-reaching consequences" and that "appropriate sanctions should be ordered taking into consideration the different degrees of participation of the several respondents" (J.A. 1401). The order which he entered, like the order proposed by the Hearing Examiner, revoked the registration of the present petitioners, and denied them trading privileges on all contract markets for a period of one year (*ibid.*).

On review of the order by a three-judge panel of the court of appeals which included retired Judge Major, the court initially affirmed the order in all respects (Pet. 1a–6a). On rehearing, the same panel, by a 2–1 vote (with Judge Major in the majority), modified the remedial provisions of the order by directing that petitioners' registrations, instead of being revoked, be only suspended for six months and that they be allowed to execute hedging contracts in the meantime (Pet. 7a–9a). On rehearing *en banc,* from which Judge Major was excluded on the ground that 28 U.S.C. 46(c) limited the court *en banc* to "active circuit judges," the court, by a 4–1 vote, set aside the order on rehearing and reaffirmed the Secretary's order without modification (Pet. 10a–36a).

ARGUMENT

1. Petitioners contend (Pet. 11–12) that the court below "held that the petitioners' failure to testify could properly be held to supply facts not supported by the substantive evidence." The court plainly did

not so hold. It stated that "a careful reading of this record will disclose" that the Judicial Officer's findings and conclusions as to the cornering of the egg market and price manipulation "were sustained by a preponderance or the greater weight of the evidence," and that the evidence discloses "a long chain of circumstances which definitely established prima facie" that the respondents in the administrative proceeding had thus acted in concert (Pet. 5a–6a).[3] The court specifically stated that the burden resting upon the Government to prove its case by a preponderance of the evidence "cannot be met by failure of the petitioners to testify or call witnesses in their behalf" (Pet. 6a). The court's further statement (*ibid.*) that such failure to testify, *after* the Government's evidence had established a prima facie case, "most assuredly creates a presumption that their testimony would have been unfavorable to them", is in full accord with the decisions of this Court, *Interstate Circuit* v. *United States*, 306 U.S. 208, 226; *Local 167* v. *United States*, 291 U.S. 293, 298; *Bilokumsky* v. *Tod*, 263 U.S. 149, 153–155. See also Mr. Justice Frankfurter's concurring opinion in *Adamson* v. *California*, 332 U.S. 46, 60.

[3] The evidence respecting concerted action, including that by the present petitioners, shows, *inter alia*, the significantly different trading pattern of these respondents compared with all other traders in the market (J.A. 230–41, 1063–70, 1081, 2043–5, 2092–3, 2095, 2145–6); sales by Miller and Company for these respondents at uniform, maximum prices (J.A. 2049–52); their uniform withholding of eggs from the shorts (J.A. 157–8, 166–7, 1048–9, 2043, 2061–3, 2070–5); and the uniform price which they demanded and received for eggs after the close of trading (J.A. 306–7, 315–6, 332–3, 2059, 2061–3).

In all events, since the court of appeals found the Judicial Officer's order to be fully supported by the evidence of record, the question whether further support could be drawn from petitioners' failure to offer evidence is immaterial. In substance, petitioners are seeking nothing more than a second review of the evidence by this Court.

2. Petitioners contend (Pet. 13) that the case presents the question of whether a reviewing court is empowered "to modify a penalty imposed by the Secretary of Agriculture which the court found to be 'unduly harsh' ". Here again, petitioners pose a question not decided by the court below. The court did not reach the question of its statutory power to modify prohibitions deemed by it to be unduly severe. It found that the evidence fully supported the Judicial Officer's conclusions that the violations were "of serious and far-reaching consequences"[4] and that petitioner Gilbert H. Miller was "the captain of the 'team' " (Pet. 14a). The court concluded that on those findings the remedial prohibitions imposed—which were admittedly expressly authorized by the statute (Pet. 12a)[5]—"were certainly commensurate with the violation and in their imposition the Secretary of Agriculture did not abuse his discretion" and

[4] No violation of the Commodity Exchange Act is more serious than a corner. See Campbell, *Trading in Futures Under The Commodity Exchange Act*, 26 Geo. Wash. L. Rev. 215, 233–242.

[5] The statute expressly authorizes the Secretary to "revoke" the registration of a futures commission merchant or a floor broker who has violated the Act and to "require all contract markets to refuse such person all trading privileges for such period as may be specified in the order" (Pet. 3).

that on "this record no lack of reasonableness" in the remedy could be found (Pet. 14a).

The holding, therefore, was that the Secretary's order represented a reasonable and permissible exercise of the discretion vested in him in determination of the appropriate and necessary remedy, and that the prohibitions of the order bore a "reasonable relation to the unlawful practices found to exist". The decision is thus well within the principles so recently applied by this Court in *Moog Industries, Inc.* v. *Federal Trade Commission*, 355 U.S. 411, in passing upon an administrative agency's determination of the appropriate remedy. The Court there said that "it is ordinarily not for courts to modify ancillary features of a valid [agency] order" and the agency's "discretionary determination should not be overturned in the absence of a patent abuse of discretion" (pp. 413, 414). To the same effect, see *Federal Trade Commission* v. *National Lead Co.*, 352 U.S. 419, 428–429; *Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U.S. 608, 612–613; *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U.S. 177, 194.

3. Petitioners' final contention (Pet. 16-18) is that the court below erroneously excluded Judge Major, a retired circuit judge, from participating in the rehearing *en banc*. Since the decision *en banc* was by a vote of 4 to 1, Judge Major's vote would not have changed the result. Furthermore, he had already voted to modify the Secretary's order (Pet. 8a), and the arguments in support of that view were before the court on the rehearing *en banc* (see Judge Schnackenberg's dissent (Pet. 33a–36a)).

Moreover, even assuming that exclusion of Judge Major, if erroneous, would be reversible error, it is clear that the court's decision on this point was correct. Section 46(c) of the Judicial Code (28 U.S.C 46(c)) provides: "A court en banc shall consist of all active circuit judges of the circuit." As there used, the word "active" stands in contra-distinction to "retired". As this Court observed in *Western Pacific Railroad Case,* 345 U.S. 247, 250–251, § 46(c) "is but a legislative ratification of *Textile Mills Securities Corp.* v. *Commissioner,* 314 U.S. 326." That decision had held that a court of appeals composed of all the circuit judges of the circuit "in active service" could properly sit *en banc* to hear and decide a case, and a footnote to the phrase "in active service" stated: "As distinguished from judges retired * * *." 314 U.S. at 327.

The interpretation placed on § 46(c) by the court below also serves to carry out the primary objective of the authority conferred—to avoid present or future conflict of decisions within a circuit. See 314 U.S. at 335; 345 U.S. at 260. If rehearings *en banc* are to promote finality of decision within the circuit, the decisions rendered should represent the views of the majority of the active circuit judges who constitute the court except for occasional service on it by district judges and retired circuit judges.

CONCLUSION

The decision below is plainly correct, and no issue is presented which warrants further review by this

Court. It is respectfully submitted that the petition for a writ of certiorari should be denied.

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Supreme Court of the United States

OCTOBER TERM, 1958

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GILBERT H. MILLER and
G. H. MILLER AND COMPANY,

Petitioners,

vs.

UNITED STATES OF AMERICA and
EZRA TAFT BENSON, SECRETARY OF AGRICULTURE OF THE UNITED STATES,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

REPLY BRIEF OF PETITIONERS

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February 10, 1959

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1. The Government is in error in asserting that the Court below did not rely upon the failure of the petitioners to testify as a basis for reaching its conclusion.

If the Government had made out a case before the Secretary of Agriculture against the petitioners, there would have been no need for any reference to the fact that the petitioners had failed to testify. The sole function of reference to such failure to testify was to fill in this gap in the Government's case. It was not, as the Government suggests, a casual reference but a holding

of the Court below, as is indicated by the repeated reliance on this factor to support its position. Thus, reference to the accuseds' failure to testify is made in the opinion as set out at pp. 2a, 3a, 5a, and 6a of the Appendix to our petition, and concludes with the proposition that the silence "creates a presumption that their testimony would have been unfavorable to them."

Neither in the Court of Appeals nor in this Court has the Government contested the accuracy of petitioners' statement as to the evidence or lack of evidence adduced by the Government. The facts, showing that the petitioners' behavior was directly contrary to that alleged in the complaint stand unchallenged. They were not challenged below and they are not attacked here.

The conspiracy charged in the complaint and found by the Judicial Officer was based on a uniform trading pattern involving all of respondents before the Secretary, including petitioner Miller: "At all times material to this complaint, the respondents acted collectively and in a uniform manner, pursuant to an understanding or agreement to corner and manipulate the egg market" (App. 19). The Judicial Officer found that the transactions complained of were undertaken "* * * pursuant to an understanding or agreement among the respondents to act collectively and in a uniform manner through respondent Miller and his firm, * * *" (App. 1384). And further "[t]hrough action in concert, the respondents developed this [dominant] position by aggressive and concentrated purchases of December futures, [on December 17-19] by standing for delivery of large quantities of cash eggs, and by temporarily withholding futures and cash eggs from sale, * * *" (App. 1385).

We urged that there was no proof against Miller as to any of those three elements of market behavior which

constitute the uniform manner of trading which was employed by the Government to find the existence of a conspiracy. The Government here does not dispute the fact that Miller's trading pattern was the antithesis of the trading pattern deemed significant. In fact the Government in summarizing the allegations in the complaint omit the reference to the charge that the trading was "in a uniform manner" (Resp. Br. p. 2).

But the Court of Appeals held that the Judicial Officer's conclusions were sustained by a preponderance of the evidence and that the action in concert was disclosed by a long chain of circumstances. The principal charge and major attack against Miller as one of the accused was that he engaged in a uniform trading pattern and it was on this basis that he was included as a participant in a conspiracy. It is undisputed that no proof was offered and no evidence exists in support of that charge. Quite apparently, the circumstances which the Court of Appeals employed to include Miller as a conspirator was his failure to testify.

The Government without any warrant in the record has arbitrarily lumped Miller as a conspirator with all of the accused. References to the accused, including petitioner Miller, are made by the use of the nondescript pronouns "they" and "their". Thus in footnote 3, page 5 of Respondents' brief in opposition it is asserted that the evidence respecting concerted action shows significantly the difference in trading pattern of the accused as compared with all other traders in the market. But petitioner Miller's trading pattern is contrary and in conflict with that of the other accused and compares with the trading of other traders in the market. So also it is urged that concerted action is repeatedly shown by "*their* uniform withholding of eggs from the shorts," but the record is undisputed that this

petitioner aggressively sold all the eggs which he possessed and delivered nine cars into the futures market. Finally, it is alleged that "*they* demanded and received" uniform prices for eggs after the close of trading. The petitioner Miller had no eggs for sale after the close of futures trading. He had sold them all prior thereto. (See statement in Petition for Writ of Certiorari, pp. 5 and 6.)

2. The Government is in error in suggesting that the Court of Appeals did not decide the question whether it had power to modify the order of the Secretary of Agriculture.

The error of the Government's position is patent in light of the order for rehearing. The only question before the Court of Appeals *en banc* was whether that Court could modify the order of the Secretary. The order for rehearing so provided:

> "It Is Ordered, that a rehearing *en banc* shall be held and *said rehearing shall be limited to the question*—Does the Court of Appeals have the power and jurisdiction to change a penalty fixed by respondent Secretary of Agriculture, which penalty is within the statutory limits." (Appendix D, Petition for Certiorari.) (Emphasis added.)

At the oral argument, the Court restricted counsel to this question. And at the oral argument, the Government asserted that the only modification which the Court of Appeals could make was in the form of correcting clerical errors in the Secretary's order. Now that the Court below has erroneously answered the question which was mooted at the rehearing, the Government seeks to evade the effect of the error by suggesting that the Court of Appeals was really deciding something other than the one question which, by its own order, was before it.

The Government seeks to support its argument by reference to an article by one of its counsel which appeared in the George Washington Law Review in January 1958, Campbell, Trading in Futures under the Commodity Exchange Act, 26 George Washington Law Review, 215. Such a self-serving statement is hardly authority for the arguments proposed. It might have been more significant had counsel advised this Court that in interpreting the powers of the Court of Appeals on appeal from an administrative decision under the Commodity Exchange Act, Campbell had acknowledged that:

> "The courts of appeal are vested with jurisdiction to affirm, set aside or modify the administrative determination, ..."

This is the position we advocate here, which we advocated below and which the Court of Appeals rejected.

3. The Government erroneously suggests that the disqualification of Judge Major was not error and if it were error was harmless.

The only reason put forth by the Government as to why retired judges who are assigned to active duty are not to participate in rehearings *en banc* is because they will not be occupied with future cases in which the decision *en banc* will be guiding. We do not have the statistics available to us, but the Court can take judicial notice of the fact that retired Circuit judges have continued to sit for long periods of time after the date of their retirement. Indeed, many of them have carried a calendar no less onerous than some of the judges who have not "retired." Certainly this is true of the Fourth Circuit: we submit that it is also true of the Second and Seventh Circuits. What the Government's argument amounts to is that Circuit judges ought not to participate in rehearings

en banc if they are of an advanced age, since they will not be sitting on a great many cases in the future.

The Government's notion that the disqualification of Judge Major was harmless is based on a grosser error. It assumes that the appellate judicial process is not a deliberative process but merely a casting of ballots, as in an election. If the appellate judicial process is a rational one, in which each of the judges is expected to make available his thoughts to the others about the proper resolution of a case, the erroneous disqualification of a judge from a panel on which he is entitled to sit certainly cannot be said to be "harmless error."

Respectfully submitted.

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